IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 192 OF 1984

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

==========

GIRISHBHAI MATHURBHAI & ANR. - Appellant(s)
Versus
GHANSHYAMBHAI BHAGVANBHAI - Respondent(s)

==========

Appearance :
MR. TRILOK J. PATEL for MR. JITENDRA M. PATEL for Appellant(s).
MR. MEHUL S. SHAH for Respondent(s).

==========

CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 03/08/2006

ORAL JUDGMENT

Present is a Second Appeal at the instance of the defendant against the judgement and decree passed by the learned Extra Assistant Judge, Vadodara on 7th

October, 1983 in Regular Civil Appeal No.400 of 1980 whereunder the learned Appellate Judge had reversed the judgement and decree dated 29th October, 1980 passed by the learned Civil Judge (J.D.), Padra in Regular Civil Suit No.270 of 1977.

2. The facts leading to the present appeal are that Patel Bhagwanbhai Motibhai (the original plaintiff since deceased) filed a suit against Patel Mathurbhai Dadabhai (since deceased through their legal representatives), claiming a decree for injunction, perpetual as well as mandatory, on the ground that in view of the Sale Deeds, Exhs.41 and 42, the chowk facing the front of the defendant's house and which is also in front of the house of the plaintiff is to be kept open, the defendant has no right of construction and any construction made by the defendant would adversely hamper the right and interest of the plaintiff, therefore, the construction of the wall already raised be demolished and the defendant be restrained from raising any construction.

2.1 The suit was contested on every possible ground by the present appellant-defendant and he submitted that his father had sold the property to plaintiff under

Exh.77 with a clear stipulation that the chowk in front of his house, which runs upto the wall of Chhitabhai and another, would belong to him. According to the defendant, the plaintiff has a right of eavesdrop (flow the rain water) and foot-track of 7 ft. only and he cannot seek injunction against the defendant restraining him from raising any construction, which would be a part of better use of his property.

2.2 The learned trial Court, after recording evidence and hearing the parties, dismissed the suit, but, the learned first Appellate Court reversed the said findings, therefore, the defendant is before this Court.

3. The appeal has been admitted for hearing on 28th December, 1984 on the following substantial question of law:

> *"Whether in the facts and circumstances of the case, the right acquired by the respondent-plaintiff should have been confined to reasonable user only in view of Sec. 28 of the Indian Evidence Act or should have been extended to the entire chowk?"*

It appears that the question has not been

properly formulated or has not been properly recorded by the concerned person. Under the circumstances, I propose to reframe the question in the following words :

> “Whether on the facts and in the circumstances of the case, the plaintiff, under Exhs.41 and 42, acquired an absolute right to use the entire chowk for flowing the rain water and use it as his way to go to the main road or whether his right is confined only to the extent of foot-track?”

4. The learned Counsel for the appellant-defendant submitted that from Exh.77, it would clearly appear that the property, along with the open chowk, has been sold to the defendant, which would be clear from the recitals of the sale deed and would also be clear from the words, which say that the house along with the open chowk, the boundary of which extends upto the house of Chhitabhai, was being sold. He submits that in the sale deeds, Exhs.41 and 42, wherein the plaintiff and his predecessor in title had purchased the property, it would clearly appear that a right of foot-track was reserved in favour of the plaintiff's predecessor in title and the plaintiff and the further right was to flow the rain water.

According to him, adjoining the main road, there is already a wall of 10 ft. x 2 feet; next to it, there is a gate of 7 ft. width, which attaches the wall of Chhitabhai. If that 7 ft. gate is still available and the defendant wants to put his property to better use, then, the plaintiff cannot be allowed to say that he can use the entire chowk as a common chowk. His submission is that the right is to be understood in its proper perspective and cannot be allowed to cause damage to the right, title and interest of the defendant.

5. On the other hand, the learned Counsel for the respondent-plaintiff submits that from a perusal of Exhs.41 and 42, it will clearly appear that the chowk was kept as a common chowk, it was to be kept open and the plaintiff had an absolute right to have a foot way and flow the rain water. His submission is that on a juxtapose reading of Exhs.41 and 42 and other material evidence available on the record, it would be clear that the chowk was to be kept open, each of the parties was to be allowed to use it and the defendant would have no right to make any construction.

6. After hearing the parties, I must immediately say that the learned first Appellate Court wrongly placed

an extra reliance upon the oral evidence, less appreciating that the rights of the parties are codified and confined in their respective sale deeds. From the language embodied in Exh.77, it would clearly appear that the chowk had been sold in favour of the defendant. Even otherwise the plaintiff does not claim any ownership over the open chowk. His case is that he is entitled to exercise the rights, which were conferred upon him under Exhs.41 and 42.

7. Once it is held in favour of the defendant that he is the owner of the open chowk, then, the question would be that to what extent, the plaintiff would have the right to flow the rain water or use the property for foot-track.

8. The learned Counsel for the respondent-plaintiff submits that as the chowk was to be kept open and the plaintiff had a right to reach from any point of the open courtyard to the exit point/gate and connect himself to the main road, the defendant cannot be allowed to make any construction.

9. The argument of the learned Counsel for the respondent is contrary to the records and the document of

title, which was executed in his favour. The document simply says that the chowk would be for common user, that is, the right of way is given to the plaintiff and he would also be entitled to flow the rain water. If the right of foot-track or use the land to some extent is given to the plaintiff, then, by no stretch of imagination or application of any law, a right can be extended or expanded beyond its reasonable application. In the present matter, it is not the case of the plaintiff that 7 ft. gate is being closed or his right of way or right to flow the water is hampered in any manner. His case is that from his exit point to the wall abutting the main road, the defendant cannot make any construction. Assuming for a minute that the submission is correct, then too, the plaintiff would not be entitled to go upto that wall and then take a turn towards east and thereafter, come out from the gate and join the main road. In any case, the plaintiff would be entitled to go out of his house, enter in the open chowk and take a turn to the eastern side and then, go straight to the northern side where the gate abuts the main road. The proposed construction does not interfere the right of way of the plaintiff in any manner.

10. The learned Court trial was justified in

dismissing the suit and the Appellate Court was unjustified in granting the decree in favour of the plaintiff. As on today, the plaintiff's right of flowing water and to have a foot-track is not adversely hampered, there is no further reason to discuss the said subject. The present suit is a suit for prohibitory and mandatory injunction.

11. For the reasons aforesaid, the plaintiff has no right to restrain the defendant from raising the construction if the act of the defendant does not hamper his right of way or right to flow the water.

12. Taking into consideration the totality of the circumstances, I must answer the question in favour of the appellant and must hold that the suit deserves to be dismissed. The appeal is allowed. The suit of the plaintiff is dismissed with costs through out, Counsel's fees Rs.1,500/-. Decree be framed accordingly.

[R.S.Garg, J.]

*kamlesh**